

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 PEND-AIR CITIZEN'S COMMITTEE,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF PENDLETON,)
11)
12 Respondent,)
13)
14 and)
15)
16 PENDLETON SANITARY SERVICE, INC.,)
17)
18 Intervenor-Respondent.)

LUBA No. 94-178

FINAL OPINION
AND ORDER

19
20
21 Appeal from City of Pendleton.

22
23 J. Haggerty-Foster, Weston, filed the petition for
24 review and argued on behalf of petitioner.

25
26 Jeff Bennett and E. Andrew Jordan, Portland, filed a
27 response brief. With them on the brief was Tarlow, Jordan &
28 Schrader. Jeff Bennett argued on behalf of respondent.

29
30 Douglas E. Hojem, Pendleton, filed a response brief and
31 argued on behalf of intervenor-respondent. With him on the
32 brief was Corey, Byler, Rew, Lorenzen & Hojem.

33
34 GUSTAFSON, Referee; SHERTON, Chief Referee; LIVINGSTON,
35 Referee, participated in the decision.

36
37 AFFIRMED 06/27/95

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a city council decision upholding
4 the city planning director's determination that a solid
5 waste transfer station is a permitted use in the city's
6 Light Industrial (M-1) zone.

7 **MOTION TO INTERVENE**

8 Pendleton Sanitary Service, Inc. (PSS) moves to
9 intervene on the side of respondent. There is no objection
10 to the motion and it is allowed.

11 **FACTS**

12 During 1993, the City of Pendleton (city) completed a
13 study of alternatives for its solid waste disposal. Based
14 on that study, conducted by the city's Sanitary Regulatory
15 Board (SRB), the city decided to close its landfill and
16 instead have solid waste collected at a solid waste transfer
17 station, then transported to a regional landfill for
18 disposal.¹ The city contracted with PSS, which held the
19 franchise for operation of the Pendleton landfill, to locate
20 a solid waste transfer station in Pendleton. Working with
21 the city, PSS considered numerous sites, including a site
22 zoned M-1, at 4800 NW "H" Avenue (hereafter "the site").
23 The site is owned by the city, under the authority of the

¹All parties stress the political and financial reasons for the city's study of alternatives for solid waste disposal. Discussion of those reasons is not necessary to the disposition of this appeal.

1 city's Airport Commission. It is adjacent to the Pendleton
2 airport and is surrounded by M-1 zoned land, including a
3 nonconforming residential neighborhood, known as the "Pend-
4 Air" neighborhood.

5 The city initially indicated to PSS that a solid waste
6 transfer station in the M-1 zone would require a conditional
7 use permit. However, on January 14, 1995, the city planning
8 director issued a letter to PSS which read, in relevant
9 part:

10 "This letter shall constitute zoning approval for
11 your company to locate a solid waste transfer
12 station at 4800 Northwest 'H' Avenue. The subject
13 property is zoned M-1, Light Industrial.

14 "The Standard Industrial Classification (SIC)
15 Manual designates a facility that collects and
16 transports solid waste, without disposal, as
17 Industry Number 4212. Section 52 of the Pendleton
18 Zoning Ordinance (Ordinance No. 3250) sets forth
19 that businesses within SIC code 42 are allowed in
20 the Light Industrial zone as an outright use.
21 Thus, the facility can be located on the site
22 without a conditional use permit from the
23 Pendleton Planning Commission." Record 391.

24 Thereafter, PSS and the city proceeded with plans for
25 PSS to lease the site from the city to construct a solid
26 waste transfer station.² On February 1, 1994, the city

²PSS described the proposed solid waste transfer station as follows:

"The proposed use at 4800 N.W. 'H' Avenue will be only the collection and transportation of solid waste to a remote disposal site. Under no circumstances will solid waste (garbage and refuse) ever be processed, destroyed or disposed of at the proposed transfer station.

1 council authorized execution of a ground lease of the site
2 between the city and PSS. On March 1 and 15, 1994, the city
3 council considered and adopted amendments to its Solid Waste
4 Ordinance to effectuate an April 9, 1994 closure of the
5 landfill, and commencement of solid waste transfer
6 operations. It also amended the city's solid waste
7 franchise with PSS to reflect those decisions.

8 Petitioner, a group of residents of the Pend-Air
9 neighborhood, reportedly learned of the siting of the solid
10 waste transfer station near the end of March, 1994, when one
11 of its members observed a survey crew at the site.
12 Petitioner first objected to the choice of the site at a
13 city council meeting on April 5, 1994. Thereafter,
14 petitioner appeared before the SRB on several occasions,
15 appealed the planning director's decision to the planning
16 commission, and requested a hearing from the Oregon
17 Department of Environmental Quality.

18 On May 3, 1994, petitioner again objected to the site
19 of the proposed solid waste transfer station before the city
20 council. On that date, over petitioner's objections, the
21 city council reauthorized execution of the ground lease for

** * * * *

"All material collected specifically for recycling at the proposed transfer station site (4800 NW 'H' Avenue) will be either transported directly to market in the collection containers or removed from the transfer station to another location for baling, loading, and shipment to market."
Record 229-30.

1 the site between PSS and the city. At that meeting, the
2 city council also referred petitioner's appeal of the
3 planning director's decision to the planning commission.

4 The planning commission heard petitioner's appeal on
5 June 2, 1994. Over petitioner's objections, the planning
6 commission did not evaluate the selected site for the
7 proposed solid waste transfer station. Rather, it limited
8 its review to the planning director's decision that a solid
9 waste transfer station is an outright permitted use in the
10 M-1 zone. The planning commission failed to reach a
11 consensus and tabled the matter to July 14, 1994.

12 After a July 14, 1994 public hearing limited to the
13 issue of whether a solid waste transfer station is an
14 outright permitted use in the M-1 zone, the planning
15 commission overturned the planning director's decision,
16 finding that a solid waste transfer station in the M-1 zone
17 requires a conditional use permit. That decision was
18 adopted on August 4, 1994.

19 Both petitioner and PSS appealed the planning
20 commission decision to the city council. The city council
21 held a hearing on September 6, 1994. It also limited its
22 review to whether a solid waste transfer station is an
23 outright permitted use in the M-1 zone. At the close of
24 that hearing, the city council overturned the planning
25 commission decision and affirmed the planning director's
26 determination. This appeal followed.

1 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 Petitioner contends the city council wrongfully refused
3 to consider the issue raised in petitioner's appeal of the
4 planning director's decision, i.e. that the proposed site is
5 an inappropriate location for a solid waste transfer
6 station. Petitioner argues that the city thereby violated
7 procedural requirements applicable to the evaluation of land
8 use applications, as well as the Fourteenth Amendment to the
9 United States Constitution, and Article I, section 20, of
10 the Oregon Constitution. The essence of petitioner's
11 arguments under these assignments of error is that
12 procedurally, the city "can't simply ignore the subject of
13 the appeal," and that the city was biased against petitioner
14 in reaching its decision. Petition for Review 14.

15 **A. Scope of Local Review**

16 The basis of petitioner's allegation of procedural
17 error is not that its members were not afforded a hearing,
18 but rather that they were not afforded a hearing on the
19 impacts of a solid waste transfer station at the subject
20 site on the adjacent residential neighborhood.³ Petitioner

³Petitioner complains that the city lost its appeal document, and at one point stated the appeal was not timely filed. However, petitioner does not contend it was denied an appeal based on either of these factors. Petitioner also argues the city failed to provide the required notice and hearing. However, petitioner does not deny its members received adequate notice of the hearing on its appeal of the planning director's decision. Petitioner has not shown it was denied a hearing, nor has it established any procedural violations in the conduct of the various hearings before the city.

1 simply disagrees with the scope of the city's review, and
2 wishes to expand the scope of review to an evaluation of
3 whether the subject site should be used for a solid waste
4 transfer station.

5 The decision petitioner appealed was a planning
6 director determination that a solid waste transfer station
7 is an outright permitted use in the M-1 zone. The city was
8 neither required nor authorized, during the appeal
9 proceeding at issue, to expand the scope of the inquiry to
10 an evaluation of appropriate uses in the M-1 zone.
11 Petitioner did not have a right to a hearing on an issue
12 unrelated to the decision petitioner appealed.

13 Petitioner has not established any procedural or
14 constitutional violations resulting from the city's refusal
15 to consider an issue not relevant to the decision appealed.⁴

16 This subassignment of error is denied.

17 **B. Bias**

18 Petitioner generally alleges under its constitutional
19 claims that the city's bias prevented petitioner's members
20 from obtaining a fair hearing. Petitioner argues the city
21 had already decided to locate the solid waste transfer
22 station at the site before petitioner's members were even
23 aware that the site was under consideration. Petitioner

⁴Petitioner also appears to argue that under Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973), the city was required to consider the issue it wished to raise on appeal. Fasano does not support such an interpretation.

1 argues that the city's ownership of the property, its
2 involvement in the decision to close its landfill, its
3 decision to open a solid waste transfer station, and its
4 franchise relationship with PSS precluded petitioner from
5 obtaining a fair and impartial hearing. Petitioner also
6 cites as bias the city council's refusal to consider the
7 issue it raised on appeal.

8 When alleging bias, the burden is on petitioner to
9 establish its existence. Petitioner must establish that the
10 decision makers were incapable of making a decision based on
11 the evidence and arguments before them due to bias, or that
12 the decision makers prejudged the application and did not
13 reach a decision by applying relevant standards based on the
14 evidence and argument presented. Nalette v. City of Klamath
15 Falls, 28 Or LUBA 709, 710, aff'd 134 Or App 414 (1995);
16 Spiering v. Yamhill County, 25 Or LUBA 695 (1993).
17 Speculation or postulation on the part of petitioner is
18 insufficient. Beck v. City of Tillamook, 113 Or App 660,
19 833 P2d 1327 (1992).

20 Petitioner has not established that the city council
21 deprived it of a fair and impartial hearing, or that the
22 council members were biased against petitioner. The city
23 council's refusal to consider irrelevant issues does not
24 indicate the city council was biased in its evaluation of
25 the appeal. In making decisions related to the closure of
26 the landfill and providing a mechanism for disposal of the

1 city's solid waste, the city council was carrying out its
2 responsibilities as a governing body. That conduct provides
3 no basis for an inference of bias. See Beck, 113 Or App at
4 663; see also 1000 Friends of Oregon v. Wasco Co. Court, 304
5 Or 76, 742 P2d 39 (1987), cert den 486 US 1007 (1988).

6 This subassignment of error is denied.

7 The first, second and third assignments of error are
8 denied.

9 **SEVENTH, EIGHTH AND NINTH ASSIGNMENTS OF ERROR**

10 Petitioner alleges that the city's decision is contrary
11 to "the statutes, goals or rules that the comprehensive plan
12 and land use regulations implement", as well as Statewide
13 Planning Goals (Goals) 2 (Land Use Planning) and 11 (Public
14 Facilities and Services), and that the city exceeded its
15 jurisdiction in reaching its decision. Petition for Review
16 18.

17 The essence of these arguments is that the city
18 decisions surrounding the closure of the city's landfill,
19 the replacement of that landfill with a solid waste transfer
20 station and the location of that solid waste transfer
21 station at the subject site constitute a de facto amendment
22 of the city's comprehensive plan. According to petitioner,
23 the comprehensive plan mandates that the city dispose of its
24 solid waste at the present landfill location. Therefore,
25 petitioner argues the decision to permit a solid waste
26 transfer station at another location constitutes an

1 amendment to the comprehensive plan.

2 The only issue in this appeal is the city council's
3 decision to uphold the planning director's determination
4 that a solid waste transfer station is an outright permitted
5 use in the M-1 zone. The city council's decisions to close
6 the city's landfill and authorize the operation of a solid
7 waste transfer station are not properly before us and we do
8 not consider them here.

9 As it relates to the subject of this appeal, PSS
10 responds that petitioner did not raise the issue of whether
11 the decision constitutes a de facto comprehensive plan
12 amendment before the city and, therefore, under ORS
13 197.763(1) and 197.835(2), petitioner has waived the right
14 to raise it in the first instance before this Board.

15 Where a party contends petitioner has waived certain
16 issues, and petitioner neither cites where in the local
17 record those issues were raised nor contends it may raise
18 new issues under ORS 197.835(2)(a) or (b), the issues have
19 been waived. Cox v. Yamhill County, ___ Or LUBA ___ (LUBA
20 No. 94-255, May 25, 1995), slip op 4. Petitioner has done
21 neither here. Therefore, this issue has been waived.

22 In any case, petitioner has not established that the
23 city's decision constitutes a de facto amendment of the
24 city's comprehensive plan, or that Goals 2 and 11 were
25 either applicable or violated. The city merely interpreted
26 its zoning ordinance in determining that a solid waste

1 transfer station is an outright permitted use in the M-1
2 zone. That code interpretation does not in any way amend
3 the city's comprehensive plan or require compliance with the
4 Goals.

5 The seventh, eighth and ninth assignments of error are
6 denied.

7 **FOURTH THROUGH SIXTH AND TENTH THROUGH SIXTEENTH ASSIGNMENTS**
8 **OF ERROR**

9 Petitioner contends that the city zoning ordinance
10 provisions regarding solid waste transfer stations are clear
11 and unambiguous, and that the city's decision that a solid
12 waste transfer station is an outright permitted use in the
13 M-1 zone is contrary to the language, purpose, policy and
14 context of the ordinance. Petitioner argues a solid waste
15 transfer station is a solid waste disposal facility, which
16 is a conditional use in the M-1 zone. Petitioner further
17 argues that such a solid waste disposal facility is
18 prohibited near residential areas.

19 A "solid waste transfer station" is not specifically
20 defined or categorized in the city zoning ordinance.
21 Rather, the city relies on the Standard Industrial Code
22 (SIC) Manual to identify uses allowed by the city zoning
23 ordinance. Under Pendleton Zoning Ordinance 3250, Art. VII,
24 Section 53(J), uses within SIC Major Group 42, entitled
25 "Motor Freight Transportation and Warehousing," are outright
26 permitted uses in the M-1 zone. The city council adopted
27 the planning director's determination that a solid waste

1 transfer station falls within SIC Major Group 42. Under
2 Major Group 42, Industry 4212 includes business
3 establishments that are "primarily engaged" in "[c]ollecting
4 and transporting refuse, without disposal", and in
5 "[g]arbage and refuse, collecting and transporting: without
6 disposal." SIC Manual 224; Record 128. The description of
7 Industry 4212 also provides that "[e]stablishments primarily
8 engaged in collecting and disposing of refuse by processing
9 or destruction of materials are classified in Industry
10 4953[.]" Id.

11 Petitioner contends a solid waste transfer station
12 falls within SIC Major Group 49, Industry 4953.⁵ SIC Major
13 Group 49 is entitled "Electric, Gas and Sanitary Services,
14 and includes "sanitary systems engaged in the collection and
15 disposal of garbage, sewage, and other wastes by means of
16 destroying or processing materials." SIC Manual 237; Record
17 129. Industry 4953 specifically includes businesses that
18 are "primarily engaged in the collection and disposal of
19 refuse by processing or destruction" and further states that
20 "[e]stablishments primarily engaged in collecting and
21 transporting refuse without disposal are classified in

⁵Petitioner further asserts that under ORS ch 459, a waste transfer station is considered a solid waste disposal site and that, under ORS 459.065, to the extent local ordinances are inconsistent with ORS ch 459, the statute controls. ORS ch 459 regulates solid waste management and disposal. It does not regulate or define uses for purposes of siting decisions under local zoning ordinances. ORS ch 459 does not apply to this decision.

1 Industry 4212." Id.

2 This Board is required to defer to a local governing
3 body's interpretation of its own enactment, unless that
4 interpretation is contrary to the express words, purpose or
5 policy of the local enactment or to a state statute,
6 statewide planning goal or administrative rule which the
7 local enactment implements. ORS 197.829; Gage v. City of
8 Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v.
9 Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).⁶
10 This means we must defer to a local government's
11 interpretation of its own enactments, unless that
12 interpretation is "clearly wrong." Reeves v. Yamhill
13 County, 132 Or App 263, 269, 888 P2d 79 (1995); Goose Hollow
14 Foothills League v. City of Portland, 117 Or App 211, 217,
15 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89,
16 93, 840 P2d 1354 (1992). Additionally, under Gage v. City
17 of Portland, 123 Or App 269, 860 P2d 282, on reconsideration
18 125 Or App 119 (1993), rev'd on other grounds 319 Or 308
19 (1994), and Weeks v. City of Tillamook, 117 Or App 449, 453,
20 844 P2d 914 (1992), we are required to review the governing
21 body's interpretation of its enactment, as expressed in the
22 challenged decision.

⁶ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the Court of Appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

1 The city council's decision includes an analysis of the
2 applicable SIC Manual provisions, and concludes that a solid
3 waste transfer station falls within SIC Major Group 42,
4 Industry 4212. Under the city's zoning ordinance, uses
5 within SIC Major Group 42 are permitted outright in the M-1
6 zone. The city council's interpretation is not clearly
7 wrong and we defer to it.

8 Assignments of error four through six and ten through
9 sixteen are denied.

10 **SEVENTEENTH ASSIGNMENT OF ERROR**

11 Petitioner alleges the city's decision is not supported
12 by substantial evidence. The essence of petitioner's
13 argument is that there is overwhelming evidence in the
14 record to establish there are conflicts between residential
15 uses and a solid waste transfer station.

16 Regardless of whether the evidence cited by petitioner
17 is found in the record, it is not relevant to the decision
18 at issue. The city decided a solid waste transfer station
19 is an outright permitted use in the M-1 zone. Evidence that
20 uses permitted in the M-1 zone may conflict with other uses
21 existing in that zone is not relevant to the decision
22 appealed.

23 The seventeenth assignment of error is denied.

24 The city's decision is affirmed.